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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED STATES AND CANADA, AFL-CIO, *Respondent.*

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AMICUS CURIAE

To the Honorable, the Justices of the United States Supreme Court:

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves the Court to grant it leave to file the attached Brief which is herewith lodged with the Court. In support whereof, the Chamber states:

1. This case presents an issue of national importance in the administration of the National Labor

Relations Act: the validity of the Board's "control" doctrine as applied to determine whether an employer subjected to boycott pressures by a union, is protected from such coercion by Section 8(b)(4)(B) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(4)(B).

2. The Chamber, as the nation's largest association of employers,* frequently participates as an *amicus curiae* in cases of national impact even when individual employers are also party to the lawsuit. See, *e.g.*, cases cited p. 2, *infra*. Here, however, none of the party-employers has participated in the litigation before the Court of Appeals. The Chamber's participation will fill the void created by their absence.

3. The issues in this case are of major importance to the Chamber's members, many of whom are actively engaged in the construction industry or are users of services provided by construction concerns. These members are directly affected by the scope of permissible pressures labor organizations may direct against contractors at jobsites to enforce product boycotts under "work preservation" agreements. The Chamber is thus vitally concerned that it have an opportunity to represent these affected interests before the Court. Otherwise the views of the contractors subject to the Union's pressures in this case as well as the views of American industry will be unrepresented in this proceeding. And the broad membership interests represented by the Chamber places it in a position to bring to the Court's attention considerations which might not be addressed by the particular parties to this litigation.

* The Chamber is a federation consisting of a membership of over thirty-seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of fifty-two thousand (52,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals.

4. The Chamber has participated in the instant case as an *amicus* in the Court of Appeals, and the Court on February 23, 1976, granted the Chamber's motion to file a Memorandum in support of issuance of a petition for a *writ of certiorari* in the instant case.

WHEREFORE, the Chamber prays the Court to grant it leave to file the following Brief as *amicus curiae* in the above captioned case.

Respectfully submitted,

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE [1]

INTERESTS OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of fifty-

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[1] This Brief is filed contingent upon the Court's granting the accompanying Motion for Leave to Submit, *supra*.

two thousand (52,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to the Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relation matters considered by the Court. *E.g., McDonald* v. *Santa Fe*, — U.S. — (No. 75-260); *Hudgins* v. *NLRB*, — U.S. —, 96 S.Ct. — (1976); *Connell Constr. Co.* v. *Plumbers, Local 100*, 421 U.S. 616 (1975); *William E. Arnold Co.* v. *Carpenters*, 417 U.S. 12 (1974); *Super Tire Engin. Co.* v. *McCorkle*, 416 U.S. 115 (1974); *Boys Markets* v. *Local 770, Retail Clerks*, 398 U.S. 235 (1970); *Porter* v. *NLRB*, 397 U.S. 99 (1970).

The issues in this case are of major importance to the Chamber's members many of whom are actively engaged in the construction industry or are users of services provided by construction concerns. The issues posed herein, which include the validity of the Board's control standard as the major factor separating lawful from proscribed conduct under Section 8(b)(4)(B) of the National Labor Relations Act (29 USC § 158(b)(4)(B)), are of immediate concern to the Chamber's members. These members are directly affected by the scope of permissible pressures labor organizations may direct against contractors at jobsites to enforce product boycotts under "work preservation" agreements. The Chamber is thus vitally concerned that it have an opportunity to represent these

affected interests before the Court. Otherwise the views of the employers affected by the Union's pressures in this case as well as the views of American industry will be unrepresented in this proceeding. And the broad membership interest represented by the Chamber places it in a position to bring considerations to the Board's attention which might not be advanced by the particular parties to this litigation.

STATEMENT OF THE CASE

I. The Uncontested Facts

The Austin Company of Roselle, New Jersey ("Austin") was engaged as the general contractor for construction of the Norwegian Christian Home for the Aged in Brooklyn, New York. 204 NLRB at 760, 762.[2] Austin has no contract with Plumbers, Local 638 ("the Union") and does not employ plumbers or steamfitters. 204 NLRB at 762. Austin was also hired to engineer all job specifications for this construction project. 204 NLRB at 760, 762. These specifications included one requiring the installation of certain combination cooling and heating units to be manufactured by Slant/Fin Corporation of Greenvale, New York ("Slant/Fin").[3] The units, after purchase by Austin,

[2] References are to the Decision and Order of the National Labor Relations Board, reported at 204 NLRB 760.

[3] This specification provided in relevant part:

> Furnish at the jobsite Slant/Fin Climate Command Air Conditioners. The unit shall be complete with cabinets, filters, cooling chasis, heating coil fans, main water flow and condensate assembly . . . . The main flow and condensate assembly shall be factory installed as an integral part of the unit by the manufacturer . . . . Manufacturer shall furnish a written guarantee for a period of one year after completion of installation . . . .

carry a one-year guarantee if the internal piping is fabricated at the factory by Slant/Fin. 204 NLRB at 762. Slant/Fin has no contractual or other relationship with the Union, and it is uncontested that the Union has never sought a contract with Slant/Fin nor attempted to organize Slant/Fin's employees. 204 NLRB at 763.

Following the submission of competitive bids, Austin, on January 14, 1972, awarded the heating, cooling and ventilation work on the Norwegian project to Hudik-Ross Co., Inc. ("Hudik"). 204 NLRB at 760, 762. This work included installation of 114 Slant/Fin heating and cooling units purchased by Austin, and Hudik "was aware that the units it was to install contained internal piping that had already been cut and threaded." 204 NLRB at 760. Hudik is party to a collective bargaining agreement with the Union which includes "Rule IX". This provision provided in pertinent part (204 NLRB at 762):

> Radiator branches, converter branches and coil connections shall be cut and threaded by hand on the job . . .

Shortly after the Slant/Fin units were delivered to the jobsite on June 22, 1972, Union business agent William B. Daly informed Frank Hudik, President of Hudik, the units would not be installed because the piping inside the units was steamfitters' work. Daly contended Rule IX required internal piping in the units to be cut and threaded at the jobsite. 204 NLRB at 762. Frank Hudik told Daly these units were "part and parcel of the plans and specifications," that Hudik "had no choice in the matter," and that Hudik "did not buy this equipment." 204 NLRB at 762.

Daly also told Austin's project superintendent, Plath, that Hudik's employees would not install the units. 204 NLRB at 760, 762. The Union continued to refuse to permit Hudik's employees, who are members of the Union, to install the units, and at frequent intervals until at least September 1972, Union steward Zimmerman told Plath that Hudik's employees "were still under instructions from the Union not to install the Slant/Fin units." 204 NLRB at 763. As of the time of the unfair labor practice hearing on November 15, 1972, the Union still refused to install these units.

II. The Decisions Below

The Board concluded that the object of the Union's work stoppage was either to force "a change in Austin's manner of doing business [with Slant/Fin] or [to force] Hudik to terminate its subcontract with Austin." 204 NLRB at 760. Since Hudik could not reassign the completed thread work to its employees and thus was powerless to meet or satisfy the Union's demands, the Board applied its control doctrine to conclude that the Union's coercive pressure was not lawful activity. Rather, this conduct was undertaken for its effect on other employers like Austin and Slant/Fin whose specification practices and manufacturing methods were inconsistent with the Union's interests.

The Board noted that the Union did not limit the focus of its conduct to Hudik. The Union directly and repeatedly informed Austin that "it would not let Hudik install the [Slant/Fin] units involved." 204 NLRB at 760. Accordingly, the Board held the

Union's work stoppage was a secondary boycott which violated § 8(b)(4)(i) and (ii)(B) of the Act.[4]

Sitting *en banc* and with four circuit judges dissenting, the Court of Appeals remanded the case for further proceedings. 521 F.2d 885. The majority opinion disagreed with the Board's legal analysis and its factual finding. The majority considered the control standard to be a *per se* test, incompatible as a matter of law with this Court's interpretation of § 8(b)(4)(B) in *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612 (1967). The majority stated (521 F.2d at 903): "We do not think that an employer who is struck by his own employees [to enforce a valid work preservation clause] can ever be considered a neutral bystander in a dispute not his own." With respect to the Board's factual findings, the majority concluded (521 F.2d at 903) the Union's work stoppage did not itself "[indicate] that the substance of the dispute was with a third party." The majority minimized the Union's contact with Austin's jobsite representative, labeling this "single occasion," as "no more than [what] Hudik should have done . . ." 521 F.2d at 900 n.36.

The Court granted the Board's petition for a writ of certiorari on February 23, 1976.

SUMMARY OF ARGUMENT

The public policy underlying §§ 8(b)(4)(B) and 8(e) of the National Labor Relations Act protect business relationships which are outside the legitimate scope of the union's representational interests, from the disruptive impact of labor disputes. Congress did not

[4] This statutory provision, along with § 8(e) of the Act, is set forth in the Appendix attached to this brief.

attempt the impossible task of cataloging every instance where labor activity would have this adverse economic consequence. Accordingly, the statutory language of these sections suggests no criteria for distinguishing unlawful boycotts from those which have an incidental disruptive impact upon employers.

The evidentiary control standard is a valid and rational basis for distinguishing "incidental" cease doing business effects from predominate unlawful efforts to terminate or alter existing business relationships. This test properly focuses upon the relationships between the pressured employer and the other employers engaged in a common enterprise. These relationships reveal the actual options available to the pressured employer to respond to the union's demands. The right of control standard also permits examination of the direct or indirect benefits which accrue to the bargaining unit as a result of union enforcement of the work preservation clause, identification of the employer with whom the union actually has a dispute, the degree of interference with the labor relations of other employers, and the economic impact on the industry resulting from literal interpretations of work preservation agreements.

Where jobsite enforcement of such agreements confers no actual work preservation benefits upon the bargaining unit, forces construction contractors off job projects or forecloses bidding entirely where specifications reflect modern production methods, and pressures third party employers to modify or eliminate proficient manufacturing processes or abandon an available market, § 8(b)(4) precludes a labor organization from striking or picketing at the jobsite to enforce work preservation clauses.

§ 8(b)(4) also prevents labor organizations from picketing "stranger" employers to enforce work preservation agreements. Absent managerial assent to confer certain work upon union represented employees, there is no obligation owed the union which can cause a labor dispute with a non-signatory contractor, supplier or manufacturer. Non-signatory employers are not obligated by any contractual language to assign work or structure manufacturing methods in a manner dictated by union interests. Non-signatory employers are strangers *vis-a-vis* the pressuring union, and thus are not required to maintain job content to afford maximum job opportunities for union members. The work preservation concept defined in *NLRB* v. *National Woodwork Mfrs. Assn.*, 386 U.S. 612 (1967), legitimizes work preservation only for an existing bargaining unit which, of course, presupposes a bargaining representative who has previously obtained such a contractual clause from the employer.

If direct coercive pressure against non-signatory employers were outside the reach of § 8(b)(4), unions could force radical restructuring of the business methods and relationships of third parties which would necessarily widen the adverse economic consequences of labor disputes in direct controversion of federal labor policy expressed in this provision of the Act. The consequences of such conduct upon individual employers would also substantially undermine their ability to resist bargaining demands made upon them by their employees, thereby undermining the free collective principle established by the National Labor Relations Act. This in turn would grant labor organizations economic power well beyond that legitimately derived from the representation of employees, and would radically

undermine the balance between labor and management struck by Congress in the Taft-Hartley amendments to the Wagner Act. 93 Cong. Rec. 7690-91 (1947) (remarks of Senator Taft).

ARGUMENT

I. THE CURRENT SCOPE OF JOBSITE ENFORCEMENT OF WORK PRESERVATION AGREEMENTS

In *National Woodwork* [5] a bare majority of the Court upheld a "work preservation" defense, and reversed the unlawful boycott ruling of the Seventh Circuit. In so doing, the Court acknowledged that the union's jobsite strike was literally within the statutory proscriptions of § 8(b)(4)(B) of the National Labor Relations Act, but escaped this result by concluding, in the particular circumstance presented, the union's strike was outside the "spirit" of the statute. 386 U.S. at 619 (citing *Holy Trinity Church* v. *United States*, 143 U.S. 457, 459 (1892)).

This narrow holding involved one boycotted employer, Frouge Corporation, a general contractor hired to construct a housing project at a jobsite in Philadelphia. Neither the job specifications nor Frouge's contract with the project owner required that doors be precut, prefitted, or premachined. Frouge ordered premanufactured doors for this project from a door manufacturer, although "blank" doors would have been equally appropriate. Frouge hired carpenters from the Philadelphia area to perform jobsite work pursuant to an existing contractual relationship with the carpenters' union. This contract required signatory contrac-

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[5] *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612 (1967) (hereafter "*National Woodwork*").

tors to abide by local work rules, including one which prevented union members from handling any precut or prefitted millwork.[6] When the premachined doors ordered by Frouge arrived at the jobsite, Frouge's carpenter employees engaged in a work stoppage and refused to hang the doors.

The Court reasoned that the sole purpose of the union's boycott was to preserve or reacquire jobsite work tasks which Frouge had unilaterally denied bargaining unit employees. The labor dispute arose solely because Frouge in effect had assigned jobsite work to employees of the door manufacturer. Severance of Frouge's existing business relationship with that manufacturer was considered merely an "incidential" effect of the union's boycott, a consequence inherent in Frouge's reassignment of the jobsite work to his employees. The Court construed § 8(b)(4)(B) to be inapplicable to coercive jobsite pressures directed solely at one employer to persuade him to abide by his contractual promise to assign work to bargaining unit members, where that same employer could simply reassign the work to meet the union's demand and thereby end the labor dispute.

The Court expressly reserved the question presented in the instant case. 386 U.S. at 617-17n.3. That is,

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[6] This contractual provision provided in pertinent part:

> No member of this District Council will handle material coming from a mill where cutting out and fitting has been done for butts, locks, letter plates, or hardware of any description, nor any doors or transoms which have been fitted prior to being furnished on job, including base, chair, rail, picture moulding, which has been previously fitted.

Any subcontracting clause not limited to a particular is unlawful under § 8(e) of the Act. *Connell Constr. Co.* v. *Local 100, Plumbers*, 421 U.S. 616, 626, 631, 633, 635 (1975).

whether § 8(b)(4)(B) bans coercive pressure allegedly to further work preservation against a boycotted employer powerless to resolve the labor dispute which he did not cause. We show below that *National Woodwork* does not authorize jobsite strikes in these circumstances. Indeed, the reasoning in that case supports the Chamber's position that the Union's strike ostensibly against Hudik was for the unlawful § 8(b)(4)(B) purpose of forcing the general contractor Austin to cease an existing business relationship with the manufacturer Slant/Fin or to force Slant/Fin to change its production methods to accord with the Union's interest. We further show that § 8(b)(4)(B) bans coercive conduct solely for a work preservation object directed against employers who do not employ members of the pressuring union and who have no contractual obligation to make job task assignments in accord with union wishes.

II. COERCIVE JOBSITE CONDUCT WHICH FORCES OR REQUIRES CESSATION OF EXISTING BUSINESS RELATIONSHIPS OR MODIFICATIONS OF OBJECTIONABLE PRODUCTION METHODS VIOLATES § 8(b)(4)(B) OF THE ACT

In that portion of *National Woodwork* which did not reach the Court, the Board drew a distinction between boycotted contractors like Frouge who retain unilateral authority at the jobsite to assign work to bargaining unit employees and contractors like Hudik whose job assignment prerogatives are limited or extinguished entirely by the project owner, the architect, the designer or the general contractor of the construction project.

Thus, three contractors, other than Frouge, also contracted with owners for construction of various buildings in the Philadelphia area. The specifications for

these projects mandated prefitted or prefinished doors. When these doors arrived at the various jobsites, the carpenters employed by each contractor engaged in a work stoppage and refused to hang the doors. The Board concluded and the Seventh Circuit agreed [7] that the union's jobsite strikes violated § 8(b)(4)(B). The Board reasoned (149 NLRB at 658):

> As the specifications required the use of precut or prefit doors and the three contractors were required by contract to follow the specifications absent the consent of the owners of the respective projects to a change, the work of cutting out and fitting doors was thereby assigned by the owner to the mill suppliers and the general contractors were merely selected by the owners to carry out this predetermined assignment. The specifications thus effectively deprived these three general contractors of control of the assignment of this work and rule 17 of their contract therefore was no longer applicable. They could not grant the District Council's request that the work of cutting out and fitting doors be done on the jobsite, and were powerless to settle the dispute, because that work was nonexistent.

This is also the situation here. Hudik did not cause the labor dispute which arose when air-conditioning units arrived at the jobsite with a small portion of the steamfitter work already completed. It is undisputed that Hudik did not make the decision which left its employees without this portion of their jobsite tasks. Hudik played no part in the specifications formulated by Austin.[8] Frank Hudik, President of Hudik, told

[7] *National Woodwork Mfrs. Ass'n* v. *NLRB*, 354 F.2d 594 (7th Cir. 1965), *enforcing in pertinent part*, 149 NLRB 646 (1964).

[8] Most contractors are not aware of all project specifications at the time bids are submitted to the prime contractor.

Union business agent William B. Daly that these units were "part and parcel of the plans and specifications," that Hudik "had no choice in the matter" and that Hudik "did not buy this equipment" (*supra*, p.—) Unlike Fr[illegible]uge, Hudik did not unilaterally take jobsite work away from bargaining unit employees.[9] It is disingenuous to suggest as did the Court below (521 F.2d at 895) that Hudik should not have bid at all on the Norwegian project once it learned that some jobsite tasks had been assigned to Slant/Fin's employees by Austin's job specification. Such an alternative deprives bargaining unit employees of all work and decreases Hudik's profitability to the direct economic detriment of the bargaining unit employees. This consequence is wholly contrary to the employment interest of bargaining unit employees which the Court below purported to uphold, nor consistent with the "work preservation"

[9] Hudik's contractual promise to the Union is a limitation only upon Hudik's discretion to make work assignments. Hudik had no authority to limit the work assignment freedom of other contractors. Absent an express indication to the contrary in the contract, Hudik cannot be said to have agreed to indemnify the Union for work assignments made exclusively by other employers. As the Board reasoned in that portion of its *National Woodwork* decision cited above, a work preservation clause does not apply to a situation where the job assignment has been made by a third party. Since the promisor (Hudik) has not breached his promise to the Union, no contractual remedy is available, and coercive efforts to compel arbitration would also violate § 8(b)(4)(B). *Associated General Contractors* v. *NLRB*, 514 F.2d 433, 438, 439 (9th Cir. 1975) (3½ days work stoppage and monetary assessment unilaterally imposed by arbitration board coercive within § 8(b)(4)); *Acco Constr. Equip., Inc.* v. *NLRB*, 511 F.2d 848, 852 (9th Cir. 1975) (unilateral imposition of fines pursuant to arbitration clause coercive within § 8(b)(4)(B).

Union efforts to exact pay for a bargaining unit from a signatory employer in return for no work at all at the jobsite would violate § 8(b)(6) of the Act. *American News Pub. Assn.* v. *NLRB*, 345 U.S. 100, 110 (1953).

objectives it ascribed to the union. It is simply unreasonable to construe Hudik's promise to assign work to unit employees to include putting himself out of business, or at a minimum as agreement to serious dimunition or his economic viability.

Coercive jobsite condct to force a signatory contractor to reassign bargaining unit work where the disputed work assignment has been made by a third or even a fourth party not obligated by contract to respect the union's interest in maximizing jobsite work is not privileged conduct because it does not affect the labor relations of the boycotted employer. Resolution of this dispute is entirely beyond the capacity of the signatory contractor. The only party who can resolve the dispute is the owner or other person who made the job specifications. This part must either sever its contractual relationship with the signatory and replace this contractor with a non-union employer, or pressure the owner to change the specifications and order the materials from another supplier, thereby severing entirely an existing business relationship. The first option cannot be the union's purpose because, rather than preserving work for the bargaining unit, literal compliance with the union's demands necessarily forces the signatory off the jobsite, thereby depriving the bargaining unit of *all* work.

The cease doing business consequences of the second option cannot fairly be regarded as merely "incidential." These existing business relations directly affected by the boycott do not involve the struck employer. This relationship is that of the project owner and the party charged with formulating construction specifications. These are the parties whose work assignment affected the jobsite tasks. But these parties have no contractual or other obligation to regulate their

conduct in accord with the union's interests. These are the parties who may be able to resolve the dispute, but only by terminating the relationship or by restricting production methods to permit all fabrication work to be done at the jobsite. Strikes and work stoppages to force such consequences have long been regarded as beyond the reach of union boycott activities. *NLRB* v. *Local 825, Operating Engineers,* 400 U.S. 297, 304-05 (1971); *NLRB* v. *Denver Bldg. & Constr. Trades Council,* 341 U.S. 675, 688 (1951). Any other result eliminates the freedom of a prime contractor to bid on job projects with cost saving specifications and to engage reliable subcontractors to perform necessary jobsite work, and would further prevent subcontractors from bidding on available work which their employees were particularly proficient at performing. In such circumstances it is not only reasonable but imperative to infer that an object of the union's boycott is not to force the boycotted employer to perform the impossible act, of reassigning non-existant work to bargaining unit employees, but to force manufacturers to abandon or modify cost saving production methods or to force prime contractors to abandon suppliers who insist on such methods.

The pressuring union is properly liable for these foreseeable consequences of its jobsite pressure. *Local 761, Elec. Wkrs.* v. *NLRB,* 366 U.S. 667, 674 (1961); *Radio Officers' Union* v. *NLRB,* 347 U.S. 17, 45 (1954); cf. W. Prosser, *The Law of Torts.* ¶41 (3d ed. 1964).[10] This is particularly so here because if the Union's purpose was to force Austin to replace Hudik at the jobsite, its strike would directly violate § 8(b)(4)(B).

[10] "It is not expected that the officers or representatives of a union will record unlawful motivation in such a way as to constitute direct evidence." *NLRB* v. *Local 340, Elec. Wkrs.,* 301 F.2d 824, 825 (9th Cir. 1962).

NLRB v. *Denver Bldg. & Constr. Trades Council*, *supra*. The Union tacitly indicated that its real concern was the existing relationship between Austin and Slant/Fin by repeatedly telling Austin's project superintendent, Plath, that Union members would not install the Slant/Fin air-conditioning units (*supra*, p.).

Coercive jobsite conduct which directly affects the business relationships of non-signatory parties cannot be sanctioned merely because the signatory contractor could not give full content to a contractual promise to assign all jobsite work to his bargaining unit. *Local 5, Plumbers* v. *NLRB*, 321 F.2d 366, 371 (D.C. Cir.), *cert. denied*, 375 U.S. 921 (1963). Otherwise labor organizations (and employers) could repeal Congressionally enacted prohibitions on the exercise of economic weapons by contractual agreement. *Local 1976, Carpenters* v. *NLRB*, 357 U.S. 93, 104-08 (1958); cf. *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 365 (1940). The mere fact that a contract exists between the pressuring union and the boycotted employer does not render him subject to all strike and other coercive pressures. *Local 636, Plumbers* v. *NLRB*, 278 F.2d 858, 864 (D.C. Cir. 1960). *National Woodwork* recognized that the boycott provisions of the Act also protect signatory contractors used by union to conceal an unlawful boycott.

> In effect Congress, in enacting § (b)(4)(A) of the Act, returned to the regime of *Duplex Printing Co.* v. *Deering*, [254 U.S. 443 (1920)] and *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.*, [274 U.S. 37 (1926)], and barred as a secondary boycott union activity directed against a neutral employer, *including the immediate employer* when in fact the activity directed against him was carried on for its effect elsewhere. (emphasis supplied). 386 U.S. at 632.

Congress has not relaxed this statutory protection for employers who have continuing contractual relations with the pressuring union. The 1959 Landrum-Griffin Act closed certain loopholes in the 1947 statute. It can hardly be suggested that in so doing, Congress meant to authorize any union conduct previously unlawful.[11] Rather "these 1959 amendments clearly reflect a Congressional attitude that unions should have no power over neutral employers to compel secondary action." *NLRB* v. *Local 769, Elec. Wkrs.*, 405 F.2d 159, 163 (9th Cir. 1968), *cert. denied*, 395 U.S. 921 (1969).[12]

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[11] Congress added a proviso to § 8(b)(4)(B) to preserve the legality of the primary strike. See App. pp. 1a-2a. This proviso was added not to describe the outer limits of permissible activity, but "to make it clear that the [other] changes in § 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a preliminary labor dispute. It does not eliminate, restrict or modify the limitations on picketing at the site of a primary labor dispute that are in existing law." Comment, *The Landrum-Griffin Amendments: Labor's Use of the Secondary Boycott*, 45 Cornell L.Q. 724, 757 (1960), quoting H.R. Rep. No. 1147, 86th Cong., 1st Sess. 38 (1959).

[12] The court below improperly interpreted *National Woodwork* as broadly authorizing unions to enlist employers with whom the union has a contractual relationship to secure union objectives. Indeed, the court created a *per se* rule of insulation when it stated (521 F.2d at 903): "We do not think that an employer who is struck by his own employees for the purpose of requiring him to do what he has lawfully contracted to do to benefit those employees can ever be considered a neutral bystander in a dispute not his own." As we have demonstrated above, *National Woodwork* expressly protected signatory employers where, the dispute and the strike are at least in part, if not solely, directed at the labor relations and business relationships of third parties.

The opinion below is premised upon what the court perceives (521 F.2d at 895) as Hudik's "blatant violation of (its employee's)

III. THE PROPRIETY OF THE CONTROL DOCTRINE AS AN EVIDENTIARY STANDARD UNDER § 8(b)(4)(B)

The control doctrine provides a comprehensive standard to determine the actual object of a union's boycott as well as a concrete basis for distinguishing intended from incidential effects within the Court's holding in *Local 761, Elec. Wkrs.* v. *NLRB, supra,* 366 U.S. at 673-74. This standard properly focuses upon the relationships between the owner of the construction project and the prime subcontractors engaged to perform work at the jobsite. Because of the integrated nature of the work at a construction jobsite, it is particularly important to determine the origin of the decision which resulted in the jobsite strike in order to separate the offending employer from others. This first step allows a rational determination to be made as to if any, which employer, within the range of options permitted under existing business relations, may be able to satisfy the union's demands.[13]

This standard also permits precise and predictable application of two other factors, implicitly recognized in *National Woodwork,* by which the object of the boy-

contractual rights." However, the court in a footnote (521 F.2d at 895 n.25) concedes that Hudik and the Union may not have intended their contract to apply to work over which Hudik "does not have legal control".

The court below also unduly circumscribes the concept of neutrality under § 8(b)(4)(B). Of course Hudik is not "wholly unconcerned" with the outcome of the union's jobsite strike to enforce work preservation. But denying Hudik protection from the pressuring union because of this interest, obscures the real focus of the union's dispute, and eliminates the distinction between offending and other employers drawn by Congress in this statutory provision and approved in *Denver Bldg & Constr. Trades Council, supra.*

[13] Control over the disputed work does not alone privilege coercive conduct to enforce work preservation agreements. See *infra,* pp. ——.

cotting union can be discerned. A strike for work preservation against an employer who cannot reassign the work does not benefit the bargaining unit when such a strike may cause the employer's replacement at the jobsite with the immediate attendant consequence of the loss of all work. Nor does such a strike confer an indirect benefit upon the bargaining unit because literal enforcement of a work preservation clause which allows no modification for technological advances gradually reduces and ultimately eliminates employment opportunities. The strike then cannot be said to be directed at the labor relations of the boycotted employer—his only response deprives the bargaining unit of all the fruits of his successful bid. Rather, the labor relations directly affected are those of the manufacturer whose production methods assign certain jobsite tasks and assign them to production employees. It is the labor relations of the manufacturer and his employers which are the object of the unions jobsite strike. The manufacturer must change his automated, operational structure or withdraw from the market. Either course results in a direct loss of job security for his employees, and profoundly alters the reasonable expectations these employees have for higher wages, benefits, and improved working conditions.

Focus upon the available options possessed by an employer to resolve a labor dispute is firmly supported by legislative history leading to the 1947 proscription against secondary boycotts, and by the leading Supreme Court case interpreting this statutory provision. In enacting the Taft-Hartley amendments to the Wagner Act, Congress banned boycotts where:

> the employers are powerless to comply with demands giving rise to the [boycotting] activities . . . . H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947).

In *NLRB* v. *Denver Bldg. & Constr. Trades Council, supra,* the Court reasoned the council's strike was an unlawful secondary boycott because the general contractor was powerless to dispose of the dispute without terminating an existing contractual relationship with a non-union subcontractor. 341 U.S. at 688. See also *Deanglo & Local 98,* 121 NLRB 676 (1958). The District of Columbia Circuit has previously recognized that § 8(b)(4)(B) shelters employers "who are powerless to resolve a dispute." *Local 5, Plumbers* v. *NLRB, supra,* 321 F.2d at 371.

The development and application of the control standard under § 8(b)(4) is an appropriate exercise of the Board's authority derived from Congress in §§ 1, 3 (a), and 10 of the Act to apply and interpret its administrative mandate in a manner which accurately reflects changing patterns in the construction and other industries and evolving relationships between contractors and suppliers. Compare *NLRB* v. *Denver Bldg. & Constr. Trades Council, supra,* 341 U.S. at 689-90 (prime and sub-contractors not in reality same employer).

Because the distinction between lawful and unlawful strike pressure can be less than obvious other evidentiary standards have also been developed as aids in determining the purpose of challenged union conduct under § 8(b)(4). Whenever an employer's premises or jobsite temporarily becomes the worksite of an employer involved in a labor dispute, there is a great likelihood picketing will cause a loss of business and enmesh other employers in a dispute not their own. Cox, "Strikes, Picketing and the Constitution", 4 Vand. L. Rev. 574, 594 (1951). To separate unlawful from lawful picketing, the *Moore Drydock* standards "determine the object of picketing where the other evidence is equivocal." *NLRB* v. *Northern California District Council,* 389 F.2d 721, 725 (9th Cir. 1968).[14] Violation of these standards is "presumptive of illegal activity." *Local 761, Eelce.Wkrs.* v. *NLRB, supra,* 366 U.S. at 677. These standards, like the control doctrine at issue, here, are not applied on an indiscriminate *per se* basis, but are merely aids in determining the underlying question of statutory violation. *Local 861, Elec. Wkrs,* 135 NLRB 250, 255 (1962).

Another labor law area also unchartered by legislative signposts is the question of successorship. After a change of ownership in the "employing industry," representative, remedial, and arbitration obligations depend upon whether the purchaser is a "successor". Management's prerogative to dispose of or purchase enterprises must be balanced with employees' interests in continuing representative rights. These interests are extinguished or recognized on the basis of the continuity of the workforce after the sale, i.e., whether a majority of the purchaser's employees formerly worked for the seller. See *NLRB* v. *Stepp's Friendly Ford,* 388 F.2d 833, 836 (9th Cir. 1964); cited with approval

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[14] *Sailors Union of the Pacific (Moore Drydock),* 92 NLRB 547 (1950) holds that common situs picketing which met the following conditions would be presumptively lawful:

> (a) The picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer. 92 NLRB at 549.

in *Tallakson Ford, Inc.*, 171 NLRB 503, 504 (1968). The Court approved this standard in *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 263 (1974). See Note, "The Supreme Court, 1973 Term." 88 Harv. L. Rev. 43, 268 (1974).

The fashioning of these standards, as well as the control doctrine under consideration here, are particularly within administrative competence. Indeed the right of control doctrine at issue here is closely analogous to the control test applied to separate independent contractors from employees required by § 2(3) of the Act. This control test was approved in *NLRB* v. *United Ins. Co.*, 390 U.S. 254 (1968); see also *Restatement of the Law of Agency* (2d) § 220(1) and (2) (1957). Such formulas evolve from judgments based upon accumulating expertise rather than merely *ad hoc* factual determinations. J. Landis, *The Administrative Process*, 10-17 (1938). As Congress intended in delegating regulatory discretion, competing legitimate interests require careful and informed balancing.[15]

[15] Adoption of the control standard under § 8(b)(4) will not conflict with *NLRB* v. *Ins. Agents' Union*, 361 U.S. 477 (1960). Congress intended to prevent union abuse of economic power by proscribing all forms of coercion and restraint including picketing where an object falls within the ambit of this statutory provision. Unlike § 8(b)(3) of the Act involved in *Ins. Agents*, § 8(b)(4) "clearly poses the problem (of determining the union's object) to the Board for its solution." *NLRB* v. *Ins. Agents' Union*, *supra*, 361 U.S. at 498. When, as here, the exercise of economic weapons runs afoul of § 8(b)(4)(B), their proscription accords with specific Congressional intent. Section 13 of the Act specifically provides that the statutory right to strike is limited by the other provisions of the Act, such as §§ 8(b)(4) and 8(b)(7) of the Act.

IV. WORK PRESERVATION DOES NOT PERMIT UNIONS TO EXERT COERCIVE PRESSURES UPON EMPLOYERS WITH WHOM NO CURRENT COLLECTIVE BARGAINING RELATIONSHIP EXISTS

National Woodwork is premised upon an employer's contractual promise in the context of a continuing collective relationship with a union to assign work to bargaining unit employees represented by that union in a manner which comports with the union's interests. Necessarily outside the reach of this opinion are employers who have not made such a contractual promise. The Court below recognized this when it stated (521 F.2d 885, 897-98 n.29):

> When a union's sole objective is work preservation, it would be anomalous to allow it to press its demands on a general contractor with whom it has no on-going relationship.

Similarly, the Chamber submits, manufacturers and suppliers who have no contractual relationship with the pressuring union are also beyond the reach of direct pressure to force reassignment of jobsite tasks even though these employers might be able to satisfy the union's demand by modifying production systems. This limitation upon coercive union conduct to force changes in job assignments is entirely consistent with *National Woodwork*. There, the Court defined a permissible product boycott as one "addressed to the struck employer *vis-a-vis* his own employees" (386 U.S. at 645), and defined an unlawful boycott as one which "benefits . . . other than the boycotting employees or other employees of the (boycotted) employer". *Id.* The purpose of a boycott directed against a general contractor or a supplier is not to preserve work for the employees of the boycotted employer, but, instead, to

take certain work away from them. Thus, the boycott does not benefit the employees of the boycotted manufacturer, but benefits union members not in the plant but at the jobsite. Work preservation is thus not a purpose for which unions can directly pressure employers whose employees are unrepresented by the pressuring union.

A union may feel a need to protect jobsite tasks on behalf of all its members, but the protection of such board interests is limited by §§ 8(b)(4)(B) and 8(b)(7). The courts have recognized that union strikes to secure *future* work opportunities for union members or to protect the interests of union members *generally* are beyond the legitimate interests of bargaining unit employees and violate § 8(b)(4). *Local 216, Teamsters* v. *NLRB (Bigge Drayage Co.),* 520 F.2d 172, 179-80 (D.C. Cir. 1975); *NLRB* v. *New York Lithographers,* 385 F.2d 551, 555 n.10 (3d Cir. 1967); *Local 710, Meat and Highway Drivers* v. *NLRB,* 335 F.2d 709, 717 (D.C. Cir. 1964).[16] The principle that lawful boycotts cannot be extended beyond existing collective bargaining relationships has recently been reaffirmed in *Connell Co.* v. *Local 100, Plumbers,* 421 U.S. 616, 633 (1975) (strike pressure against non-signatory contractor to limit subcontracting to union represented firms is outside construction proviso § 8(e)).

National Woodwork is also directly premised upon the carefully limited precedents established in *Fibre-*

[16] These two authorities do not involve construction unions, but these labor organizations like industrial unions are fully covered by the secondary boycott provisions of the Act. *NLRB* v. *Denver Bldg. & Constr. Trades Council, supra; Markwell & Hartz, Inc.* v. *NLRB* 387 F.2d 79 (5th Cir. 1967), *cert. denied,* 391 U.S. 914 (1968).

board[17] and *Oliver*[18]. 386 U.S. at 642-43. *Fibreboard* restricted management's subcontracting prerogative because of the interests of the "existing bargaining unit". 379 U.S. at 207.[19] *Oliver* insulated a clause in a collective bargaining agreement from antitrust considerations because the clause directly related to wage rates of immediate concern "to the carriers' employed drivers." 358 U.S. at 294. And *Houston Insulation Contractors Ass'n* v. *NLRB,* 386 U.S. 664 (1967), is likewise founded upon the collective interests of existing bargaining unit employees. There jobsite employees refused to install prefabricated insulation which had not been manufactured by in-plant emplioyees. Both bargaining units were employed by the same employer, and the employer had agreed to a work-preservation agreement which limited insulation preparation to the in-plant bargaining unit. The Court viewed the jobsite work stoppage as concerted support by one group of employees for another. Since both groups of employees were employed by the struck employer and the employer could simply resolve the controversy by reassignment without terminating any business relationships, it could hardly be said the employer was involved in a "dispute not his own." 386 U.S. at 669.

The Ninth Circuit has ruled that § 8(b)(4)(B) proscribes threats of picketing directed to general contractors to compel observance of work preservation agreements. *Western Monolithics Concrete Prods. Inc.*

[17] *Fibreboard Paper Prods. Corp.* v. *NLRB,* 379 U.S. 203 (1964).

[18] *Local 24, Teamsters* v. *Oliver,* 358 U.S. 283 (1959).

[19] See also references to "established bargaining unit" (379 U.S. at 210), "work previously performed by employees in the bargaining unit" (379 U.S. at 210), "replacement of employees in the existing bargaining unit" (379 at 215).

v. *NLRB,* 446 F.2d 522 (9th Cir. 1971). Even though the general contractor in that case could conceivably have satisfied the union's demands by ordering other than prefabricated fireplaces, the absence of a collective bargaining agreement with the pressuring union, or any current employees represented by that union, placed the general contractor beyond any obligation to assign work to union members whom the contractor did not employ. The Fourth Circuit has also held that "work preservation" strikes are secondary if directed to any employers "not in (contractual) privity" with the striking union. *George Koch Sons, Inc.* v. *NLRB,* 490 F.2d 323, 327 (1973). *Accord*: *Carpenters, Local 112 (Summit Valley Inds. Inc.),* 217 NLRB No. 129 (1975), 89 LRRM 1799 (review petitions pending 9th Cir.) (Nos. 75-2064, 2166, 2770).

This limitation does not implicitly repeal § 13 of the Act or otherwise outlaw the free exercise or economic weapons. This restriction is not only fully consistent with the restrictions upon the exercise of economic weapons specifically enacted in § 8(b)(4), but also respects and implements the balance between labor and management struck by Congress in the 1947 Taft-Hartley Act. This statute was enacted to rebalance the exercise of economic weapons which enable unions to support and employers to resist collective bargaining demands. Senator Taft characterized this balance on the Senate floor before passage of the Taft Hartley Act:

> We have tried to correct secondary boycotts and jurisdictional strikes. The truth is that originally, before the passage of any of the laws dealing with labor, the employer had all the advantage. He had the employees at his mercy, and he could practically in most cases dictate the terms which he wished to impose. Congress passed the Clayton Act, the Norris-LaGuardia Act, and the Wagner Act. The latter act was interpreted by a completely prejudiced board in such a way that it went far beyond the original intention of Congress, until we reached a point where the balance had shifted over to the other side, where the labor leaders had every advantage in collective bargaining and were relieved from any liability in breaking the contract after they had made the bargain. That was a condition under which strikes actually were encouraged and protected, no matter what the purpose or the character of the particular strike.
>
> All we have tried to do is swing that balance back not too far, to a point where the parties can deal equally with each other and where they have approximately equal power. 93 Cong. Rec. 7690-91 (1947).

The Court has been faithful to this legislative intent [20] because as one noted commentator has stated: "(these) amendments represented an abandonment of the policy of affirmatively encouraging the spread of collective bargaining and the striking of a new balance between protection of the right to self-organization and various opposing claims" Cox, "Some Aspects of the Labor Management Relations Act, 1947", 61 Harv. L. Rev. 1, 2 (1947).

To permit unions to reach "stranger" employers who are under no obligation to the union, grants labor organizations broad economic leverage beyond current representational and contractual interests. Such pressure directly disrupts seemingly unrelated transactions

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[20] *E.g., Porter* v. *NLRB,* 397 U.S. 99, 109 (1970); *American Ship Bldg. Co.* v. *NLRB,* 380 U.S. 300, 316 (1965); see also *Local 60, Bookbinders* v. *NLRB,* 486 F.2d 837 (8th Cir. 1973), *cert. denied,* 416 U.S. 938 (1947).

which evolve out of increasingly close economic interrelationships. These residual impacts tip the balance of economic power in favor of unions by closing markets to employers and limiting their growth possibilities, thereby distorting existing bargaining relations, and canceling the option granted unorganized employers to resist collective bargaining demands advanced by their own employees. Denial of this ability frustrates national labor policy.[21]

[21] This restriction upon picketing at the jobsite and at the premises of third parties to enforce work preservation agreements does not abridge the constitutional guarantee of free speech. Congress, like individual states, may ban picketing which furthers the attainment of unlawful objectives. *Local 695, Teamsters* v. *Vogt*, 354 U.S. 284, 294 (1957). Congress declared the boycott to be an evil because of its serious, disruptive impact upon interstate commerce, and charged the Board in § 8(b)(4)(B) to eliminate all coercive conduct to achieve this end. Whenever peaceful picketing is carried on for such a purpose, it may be properly restricted without infringing upon First Amendment guarantees. *Local 501, Elec. Wkrs.* v. *NLRB*, 341 U.S. 694, 705 (1954). Picketing is not just speech but conduct. *Hughes* v. *Superior Court*, 339 U S. 460, 464 (1949). In recognition of this distinction, Congress in the proviso to § 8(b)(4) separated picketing from other permissible forms of publicity like handbilling Public opinion may thus be enlisted in support of work preservation goals. Unions may peacefully picket non-signatory employers within their jurisdictions to compel recognition subject only to the limitations set forth in § 8(b)(7). See Note, "Illegal Picketing under § 8(b)(7)-A Reexamination", 68 Colum. L. Rev. 745 (1968). Once lawful recognition is achieved, unions may secure direct employer assent to work preservation objectives. These alternatives in labor's arsenal readily secure work preservation interests, and there is no warrant for augmenting them by authorizing the Union's boycott here or by permitting the Union to directly picket non-signatory parties.

CONCLUSION

For the foregoing reasons it is respectfully requested that the Court issue an order directing the Court of Appeals to enforce the Board's order in full.

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APPENDIX

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The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*) are as follows:

> Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> • • •
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: • • •
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employes under the provisions of section 9: • • •
>
> *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by

another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods or not to perform any services, at the establishment of the employer engaged in such distribution;

Sec. 8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.